No. 89-1546

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ADMIRAL EQUIPMENT CO.,

Petitioner,

vs.

CURLEY JOSEPH CHARLES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the jury entitled to find Admiral liable for negligence and find Admiral not liable for products liability under the evidence of this case?

2. Did the District Court properly harmonize the jury verdicts consistent with plaintiff's separate factual and independent legal theories?

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No._____

IN THE

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October Term 1989

ADMIRAL EQUIPMENT COMPANY,

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vs.

CURLEY JOSEPH CHARLES,

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On Petition For A Writ Of Certiorari

To The United States Court Of Appeals

For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the Petition For Writ Of Certiorari seeking review of the Ninth Circuit Court of Appeals decision in this

case because there are no special or important reasons for granting certiorari according to the considerations governing review on certiorari as set forth in Rule 17 of the rules of this Court.

JURISDICTION

Respondent concurs that jurisdiction of this Court is asserted under 28 U.S.C. §1254(1).

REASONS WHY THE PETITION SHOULD BE DENIED

Admiral seeks review by claiming that the jury verdict finding Admiral negligent raises a Constitutional issue. The Ninth Circuit recognized, however, that the negligence verdict was factually and legally consistent with the verdict finding Admiral not liable for products liability.

Certiorari is not available to afford Admiral yet an additional review of the jury's negligence finding.

As Chief Justice Taft observed, "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose." Hearings Before the House Committee on the Judiciary, (1922) 67th Cong. 2d Sess., ser. 33, at 2. Petitioner has had more than two chances over the decade that this simple personal injury case has been litigated. The jury heard all the evidence and decided against Admiral. The District Court rejected Admiral's post trial motions and decided against Admiral. The Ninth Circuit court of Appeals examined the same arguments raised in this petition and decided against Admiral, setting forth its reasons in the unpublished opinion.

Admiral's petition does not raise issues of importance except to the litigants in this case. As Chief Justice Taft further observed "....[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). As set forth below, there was no error and there are no reasons for granting certiorari in this case.

COUNTERSTATEMENT OF THE CASE

Admiral argues that the verdict was inconsistent because the jury found that Admiral was negligent but that Admiral was not liable for products liability. Admiral's petition asks the Court to consider arguments previously rejected by the jury, the District Court and the Ninth Circuit. Admiral distorts, and unnecessarily limits, the evidence upon which the jury based the negligence finding.

A. The Accident

Mr. Charles was injured when his hand became caught in a mold progressing down a production line. He tried to pull his hand out of the mold once he was caught, but he was unable to free it. He tried to stop the moving conveyor carrying the mold but was unable to stop it.

The plaintiff had no way to stop the moving conveyor once he became caught. He was helpless because, contrary to Admiral's design blueprints, Admiral failed to install a necessary safety device next to the moving conveyor.

B. Admiral's Negligence

Admiral designed, manufactured and installed the entire production line, including the pour room and moving conveyor where Mr. Charles' accident occurred. Plaintiff's employer, Allen, accepted the production line as a "turnkey" operation and relied upon the expertise of Admiral in setting up the processing line, from design to construction. Allen had expected that Admiral would install a safety switch next to the moving conveyor. Indeed, Admiral had provided for a safety cut-off

switch on their design blueprints but failed to install it at the Allen factory. This safety switch would have prevented or minimized Mr. Charles' injuries.

In 1979 Allen made some changes to the processing line. Although Admiral argued to the jury, the District Court and the Ninth Circuit that the changes were unforeseeable modifications, these changes did not significantly affect the pour room operations and made no difference in the way the production line or the pour heads were used. The jury's determination that these alterations had no effect on the initial negligence of Admiral in failing to install a safety cut-off switch was based on clear and convincing evidence that the changes were not substantial and did not affect the need for a safety cut-off switch or the nature of plaintiff's injuries. The risk of injury remained the same.

C. The Verdicts Were Consistent

Contrary to Admiral's assertion that there is a Constitutional question ripe for review, the jury's verdict may be easily reconciled in reference to the evidence actually presented at trial. As the Ninth Circuit observed in rejecting Admiral's argument:

> "Admiral's first argument is without merit. The jury did not state that the equipment causing Charles' injury was not Admiral's product. Instead, it merely stated that the 1972 and 1978 versions of the pour room were 'two different products.' Although the pour room had been modified, it maintained some elements of Admiral's original design, including one of Admiral's conveyors. Therefore, although the two versions were 'different products' Admiral may still be liable for the negligent design and manufacture of its conveyor." (Opinion page 5.)

The record clearly supports the Ninth Circuit's reasoning. This petitioner

presents no Constitutional issues for review.

ARGUMENT

I.

AS A PROPER APPLICATION OF THIS COURT'S PRECEDENTS, THE NINTH CIRCUIT'S DECICION SHOULD NOT BE SUBJECT TO FURTHER REVIEW

The jury's determination of negligence in the present case was based upon substantial evidence and must be upheld. This Court has held, "it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.'" Gallick v. Baltimore and Ohio Railroad Co., 372 U.S. 108, 119 (1963) (quoting Atlantic & Gulf

Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962)

The Seventh Amendment forbids appellate reconsideration of facts found by a jury. As this Court has held, "neither we nor the Court of Appeals can redetermine facts found by the jury..." Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 358-359 (1962), reh. den. 369 U.S. 882. Indeed, the Seventh Amendment constitutes a "ban on re-examination of facts tried by a jury," and creates a "stringent ... limitation of appellate review of factual determinations ..." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 508 (1984).

Admiral's argument seeks yet another re-examination of the facts tried by the jury. Such relief is not available. The

strict liability theory and the negligence theory were factually separate and legally independent. The fact that the jury reached different results based upon the facts is neither inconsistent nor grounds for review. Indeed, the District court exercised caution in assuring that the jury fully intended to find liability on the negligence theory.

A similar issue arose in Hasson v. Ford Motor Co., 19 Cal.3d 530, 538-544; 138 Cal.Rptr. 705 (1977) where the defendant contended that the jury's finding that there was "no defect" was inconsistent with a finding of "negligence." In Hasson the jury was presented with three alternative theories of recovery against Ford: installation of improper brake fluid during the manufacturing process, failure to warn that the brake fluid would deteriorate with use, and faulty engineering, including the failure to provide a back-up braking system.

These factual contentions were submitted to the jury under the alternative legal theories of negligence and strict liability. The jury was instructed independently on each theory. As in the present case, while the two sets of instructions paralleled each other, they included no express or implied restriction on the jury's power to choose either theory as a self-sufficient basis of Ford's liability.

In the present case the jury recognized that the failure to install the safety cut-off was negligent. They were not required to find that Admiral was also strictly liable and apparently chose not to do so because there had been some modifications to the production line. Those modifications, not involving the safety cut-off, did not preclude the negligence finding. A comparable approach was taken

in Hasson at page 543:

> "The jury could reasonably have concluded that the instructions, while permitting a finding of 'defect' based on failure to warn, did not require it. Moreover, interrogatory No. 3 asked only about 'defect[s]...existing at the time [the car]....was manufactured and sold....' (Emphasis in original.) The jury could reasonably believe that the interrogatory thereby intended to exclude consideration of any 'defect' based on a failure to warn. Thus, even accepting arguendo Ford's view of the logical relationship between 'defect' and 'negligence,' the jury's answer to interrogatory No. 3 would not preclude a finding that the elements of negligence were present."

Admiral argued that the modifications to the production line limited its liability. The jury was free to consider this argument independently for each theory presented by the instructions and supported by the evidence. The jury's findings were not error and were not Constitutionally infirm. In holding that the jury's responses were not

fatally inconsistent, the Hasson court stated in language fully applicable herein:

> "A finding of inconsistent verdicts in this case would ignore the jury's express finding of negligence, and would render superfluous a legal theory submitted to the jury without objection of either party."

The jury may have believed that it need not base a verdict on strict liability because certain components of the production line had been changed in 1978, rendering the production line, as a whole, somewhat different.[1/] On the other hand, the jury recognized that the lack of a safety cut-off switch, as a specific design defect, was initially negligent and foreseeably cuased plaintiff's injuries.

[1/] An analogous situation might arise in an automotive brake failure case where the car's engine had been replaced by that of a different manufacturer. A jury might view the car, as a whole, as different from the original manufacturer's product but could, nonetheless, find the original manufacturer liable for the specific brake defect.

The jury's finding of negligence rejected Admiral's argument that the 1978 alterations relieved it of liability. The District Court and the Ninth Circuit were satisfied that the jury fully intended to find Admiral responsible for negligence. The District Court and the Ninth Circuit rejected the same arguments made by Admiral in the present petition. This court should do likewise.

Admiral's primary authorities are distinguishable from the present facts. In Garcia v. Joseph Vince Co., 84 Cal.App.3d 868; 148 Cal.Rptr. 843 (1978) the plaintiff was unable to prove that the defendant was actually responsible for the defective saw blade which caused injury. In the present case, evidence of the defective safety switch installation, defendant's responsibility for the defect and Mr. Charles's injuries was presented to the jury. There

was no dispute that Admiral manufactured, installed and designed the production line but omitted to provide the safety cut-off switch. The jury was aware that the technology for safety cut-off switches was available because the design blueprints prepared by Admiral included such a device. The evidence adequately established that a safety cut-off would have shut the production line down when activated, thus preventing or minimizing Mr. Charles's injuries. As the Ninth Circuit observed:

> "Admiral's first argument is without merit. The jury did not state that the equipment causing Charles' injury was not Admiral's product. Instead, it merely stated that the 1972 and 1978 versions of the pour room were 'two different products.' Although the pour room had been modified, it maintained some elements of Admiral's original design, including one of Admiral's conveyors. Therefore, although the two versions were 'different products' Admiral may still be liable for the negligent design and manufacture of its conveyor." (Opinion page. 5.)

Similarly, Admiral's citation to Werner v. Upjohn Co., Inc., 628 F.2d 848 (4th Cir. 1980) is misleading. In that case the plaintiff's negligence and products liability theories were each dependent upon a common fact, the failure to warn. The finding that there was negligence in failing to give an adequate warning was necessarily factually inconsistent with the finding that the drug marketed with such indadequate warnings was not unreasonably dangerous. In the present case, however, the Ninth Circuit recognized that plaintiff's theories were factually separate, legally independent, and that there was no inconsistency:

> "However, despite this finding, the jury nevertheless found that Admiral was negligent and that its negligence was the proximate cause of Charles' injuries. California courts have upheld findings of negligence where concurrent findings of substantial change have prevented the imposition

of strict liability. See Putensen, 91 Cal.Rptr. at 329.

"Further, issues 1-4 refer specifically to the 'pour room,' while issue #5 merely asks if Admiral was negligent. The jury's verdict may be reasonably construed as meaning that while not all of Admiral's changes to the pour room, i.e., the change in they type of pour heads used, were foreseeable, nevertheless a foreseeable risk existed with respect to the use of the conveyor." (Opinion page 7.)

The record clearly supports the Ninth Circuit's reasoning. Admiral was aware in 1972 that modifications to the production line were likely. The alterations made in 1978 were foreseeable, did not affect the need for a safety cut-off switch and did not affect the nature of plaintiff's injuries. The risk of injury remained the same. The jury determined that although these alterations may have resulted in "two different products," the alterations had no effect on the initial negligence of Admiral

in failing to install a safety cut-off switch.

Here, plaintiff's negligence and products theories were factually separate and legally independent. The minor, foreseeable changes to components did not affect Admiral's initial negligent failure to install a safety cut-off switch. The jury reasonably concluded that although the two versions were "different products" Admiral's initial failure to provide a safety cut-off switch was a negligent cause of plaintiff's injuries.

Admiral's arguments are not reflective of the facts presented at trial and distort the jury's findings. These arguments, previously rejected by the jury, the District Court and the Ninth Circuit, do not warrant further review.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this court; nor has the Ninth Circuit decided a federal question in a way to conflict with applicable decisions of this court or of another Court of Appeals on the same matter. The Ninth Circuit correctly upheld the jury's verdict finding Admiral Equipment Company negligent. Admiral's petition for a writ of certiorari should be denied.

Dated: April 20, 1990

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